

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MATTHEW ISHAM, individually) Civil No. CV04-00559 ACK BMK
and as Guardian Ad Litem for) (In Admiralty)
HAYDEN ISHAM, a minor,)
ROXANNE BEST ISHAM,) DEPOSITION OF
Plaintiffs,) MATTHEW ISHAM
May 3, 2005
9:00 a.m.

vs.

BLUE DOLPHIN CHARTERS, LTD.)
and BLUE DOLPHIN DIVING, LTD.,)
CAPTAIN ANDY'S SAILING, INC.,)
Defendants.)

DENNIS CLAYPOOL, SHERYL) Civil No. CV04-00570 ACK KSC
CLAYPOOL, individually and as)
Guardian Ad Litem for KRISTEN)
CLAYPOOL, a minor, SCOTT)
CLAYPOOL, and KRISTEN CLAYPOOL)

Plaintiffs,

vs.

CAPTAIN ANDY'S SAILING, INC.,)
BLUE DOLPHIN CHARTERS, LTD.)
and BLUE DOLPHIN DIVING, LTD.,)
Defendants.)

CAPTAIN ANDY'S SAILING, INC.,)

Third-Party
Plaintiff,

vs.

MATTHEW ISHAM,

Third-Party
Defendant.

-continued-

EXHIBIT B

1 mooring line?

2 MR. HUITT: When you say "normal dive," I object
3 to the use of the word "normal" in the way you put it in
4 the question. It's vague and ambiguous. You may answer
5 the question, giving him an estimate.

6 A. It completely depends on the divers I have with
7 me in the group.

8 Q. Okay. Do you have an estimate as to the maximum
9 distance from the mooring anchor, Blue Dolphin's mooring
10 anchor, seaward, the maximum distance you go seaward from
11 the mooring anchor?

12 A. An estimate? Around 130 to 150 feet.

13 Q. The dive, as you've described it sitting here
14 today, was that the intended dive for the dive group on
15 July 20, 2004?

16 A. From what I remember.

17 Q. Is that a yes?

18 A. Yes.

19 Q. Did you tell the dive students on July 20, 2004
20 where the dive would be conducted in advance of the dive?

21 A. Yes, I did.

22 Q. Do you recall what you told them?

23 A. I did my basic dive briefing on the dive site,
24 explained the name, maximum depths, about the sea turtles.

25 Q. Did you take a dive flag with you from the vessel

1 into the water on July 20, 2004?

2 A. As in a dive float?

3 Q. I'm asking about the flag. If you had it on a
4 float, that's fine. But did you take a dive flag with you?

5 A. No, sir.

6 Q. Did you take a dive float with you?

7 A. No, sir.

8 Q. Let me show you what has previously been marked
9 as Exhibit 2 to the deposition of Jeremy King. I ask you
10 to look at that exhibit.

11 Do you recognize the dive flags depicted in
12 Exhibit 2?

13 A. I've seen dive flags similar.

14 Q. In response to my earlier question, when you said
15 a dive float, were you referring to either one of the two
16 flags depicted in Exhibit 2?

17 A. I was referring to dive floats similar to that,
18 yes, sir.

19 Q. While working for Blue Dolphin, had you ever
20 taken a dive flag on a dive float into the ocean at Mokol'e
21 Reef?

22 A. Yes, sir.

23 Q. But on July 20, 2004, you did not take a dive
24 flag on a dive float with you, correct?

25 A. No, sir.

1 A. After the accident?

2 Q. Yes.

3 A. The stern. There was a lot of white water, and
4 it was taking off fast.

5 Q. When you first surfaced, can you estimate a
6 distance between you and the stern of the Spirit of Kauai?

7 A. When I looked at them?

8 Q. Yes.

9 A. They were a ways away. I would say 200 feet.
10 That's an estimate.

11 Q. 200 feet. And at that point when you first
12 surfaced, did you look at the Blue Dolphin?

13 A. After the accident, yes, I did.

14 Q. Do you have any estimate as to how far you were
15 from the Blue Dolphin when you first surfaced in the ocean?

16 A. After the accident, my estimate would be around
17 130 to 150 feet.

18 Q. When you first surfaced in the ocean after the
19 accident, where was Dennis Claypool, relative to you?

20 A. Dennis, right after the accident?

21 Q. Right.

22 A. Okay. I'll do my best. Now, I was -- it was a
23 real -- exciting time for me.

24 Q. I understand.

25 A. I remember him being fairly close. Within 7 feet

1 how far do you believe the seaward exit of the second lava
2 tube was from the Blue Dolphin's anchorage?

3 MR. HUITT: Asked and answered. You may answer
4 it again.

5 A. 130 to 150 feet.

6 Q. And how far seaward from that exit do you believe
7 that you and Dennis were when you were hit?

8 MR. LESSER: Objection to the form of the
9 question. Misstates prior testimony.

10 MR. HUITT: Do you understand his question?

11 THE DEPONENT: Your question is how far from
12 the --

13 BY MR. HILLSMAN:

14 Q. Let me withdraw it. Let me ask you this.

15 How far away from the Blue Dolphin's anchorage do
16 do you feel you and Dennis Claypool were hit?

17 MR. HUITT: Asked and answered. You're welcome
18 to answer it again.

19 A. How far away from the anchorage of the Blue
20 Dolphin was I when I was at the surface?

21 Q. When you were hit by the Spirit.

22 A. When I was hit by the boat? That's a hard
23 estimate for me. When I noticed Dennis, I believe he was
24 shore side of me. So I would still have to estimate 130
25 feet.

1 diving you had to run more than one excursion at Mokol'e?

2 A. Where I had to do two dives at Mokol'e?

3 Q. Yes.

4 A. Yes, sir. There were times I had to do two
5 dives.

6 Q. Was July 20, 2004 one of those occasions?

7 A. No.

8 Q. On July 20, 2004, there were only four people who
9 wanted to go diving, correct?

10 A. Yes, sir.

11 Q. And how soon after the divers reported to you
12 over in the office did you hand out the medical
13 questionnaires?

14 A. How soon?

15 Q. Yes. Was it right away? Did you talk to them a
16 while? What do you recall?

17 A. Once they introduced themselves to you or said,
18 You're Matt, that's when I start the filling-out process.

19 Q. What do you tell the students about the medical
20 questionnaire?

21 A. I said, This is your medical waiver. You have to
22 do this for me. Read through it.

23 I will usually X -- I will say, Print your name,
24 print your name, sign here, and date it. I will flip it
25 over and say, On this side, I want you to write a "yes" or

1 "no." I will usually circle "yes" or "no" so they
2 understand it. Write "yes" or "no" to these questions.
3 And that's what I have them do.

4 MR. HILLSMAN: Do we have the original form?

5 MR. LESSER: No.

6 MR. HILLSMAN: Again, this will be an important
7 issue. I'm not going to go with anything less than the
8 best evidence. If somebody has the original, now would be
9 the time to produce it.

10 MR. LESSER: You want to give me five minutes?

11 MR. HILLSMAN: Sure.

12 MR. LESSER: We'll take a short break.

13 (Whereupon, a recess was taken.)

14 BY MR. HILLSMAN:

15 Q. Back on the record. Matt, let me segue for just
16 a second into something else, and we will get back into
17 these releases.

18 Are DSD instructors permitted to exercise a
19 certain amount of discretion in choosing their open water
20 dive site?

21 A. Yes.

22 Q. And you, as a trained scuba instructor, did you
23 feel that the area where you guy were diving with Dennis on
24 the day of the accident was a suitable open water dive site
25 for a DSD class?

1 (Discussion off the record.)

2 (Whereupon, a PADI Participant Statement was
3 marked as Exhibit 44 for Identification.)

4 (Whereupon, a PADI Participant Statement was
5 marked as Exhibit 45 for Identification.)

6 MR. HILLSMAN: Let's go back on the record.
7 First all, can we stipulate that Exhibit 44 is a true and
8 correct photocopy of the original of Dennis Claypool's PADI
9 Discover Scuba Diving Participant Statement, and that the
10 original of that document can remain in Mr. Lesser's
11 custody?

12 MR. FORMBY: I will stipulate.

13 MR. HUITT: So stipulated.

14 MS. BLACK: I'll stipulate.

15 MR. HILLSMAN: Can we stipulate that Exhibit 45
16 is a true and accurate photocopy of Scott Claypool's PADI
17 Discover Scuba Diving Participant Statement and the
18 original of that document that we're using in this
19 deposition can remain in Rick's custody?

20 MR. FORMBY: Yes.

21 MS. BLACK: Yes. We need a copy.

22 MR. HILLSMAN: I will also note for the record I
23 marked another document as Exhibit 46.

24 (Whereupon, a Training Bulletin was marked as
25 Exhibit 46 for Identification.)

1 MR. MILLER: You can't control yourself in terms
2 of your body movements? Is that what you're saying?

3 MR. HILLSMAN: No. Thanks for joining us. Let
4 me just finish these questions.

5 BY MR. HILLSMAN:

6 Q. The fifth one down says, "Do you have a history
7 of high blood pressure, angina, or take medication to
8 control blood pressure?"

9 Can we agree that that's a compound question too?

10 MS. BLACK: Same objection.

11 MR. HUITT: The document speaks for itself. You
12 can answer.

13 A. It's the same kind of question.

14 Q. Now, have you ever had a PADI Discover Scuba
15 Diving participant give you a "yes" answer to that
16 question?

17 A. Yes, I have.

18 Q. Have any of those participants been allowed to
19 make the dive?

20 A. Unless they have retrieved the facts or a note
21 from a doctor no, they have not.

22 Q. Now, you indicated earlier that you, indeed, have
23 failed some blood pressure tests in the doctor's office.

24 Would you have answered this question with a
25 "yes"?

1 question.

2 MR. HUITT: Now we have a conflict of counsel.

3 MR. LESSER: I think it's a legitimate question
4 as described. And I'm also going to say that I think it's
5 objectionable only because it has been asked and answered.

6 BY MR. HILLSMAN:

7 Q. I'll phrase it in light of the fact that you have
8 occasionally tested positive in a doctor's office for high
9 blood pressure.

10 If I were to ask you today to tell me, "Do you
11 have a history of high blood pressure, angina, or take
12 medication to control your blood pressure," what would your
13 answer be?

14 A. "No."

15 Q. Now, if Dennis Claypool had answered this
16 question "yes," what, if anything, would you have done?

17 A. I would inquire about the reasons, and then I'd
18 have him get a fax from a doctor.

19 Q. If, after you inquired about the reasons for
20 Dennis's answer, he told you that he suffered from white
21 coat hypertension, that he was not taking any medication
22 currently, that he had passed a stress test in 2003 and
23 that the last time he had visited his family physician, his
24 heart rate was, quote, "normal," what would you have done?

25 MR. HUITT: Objection. Calls for speculation.

1 concerned about? Is that it?

2 A. Yes, sir.

3 Q. Now, the second item mentioned is going, I guess,
4 taking a dive in to the ocean, the open ocean, without
5 having a dive flag up.

6 Is that what your second comment was?

7 A. I would say that would be an unsafe working
8 environment.

9 Q. Were you asked to do that, other than the date of
10 the accident which is in question, were you asked to take
11 dive crews into the ocean without a dive flag being up?

12 A. No, sir.

13 Q. Did anyone ever refuse to put a dive flag up if
14 you asked them to?

15 A. No, sir.

16 Q. Other than yourself as the dive instructor, were
17 there other people on Blue Dolphin's, the times you sailed
18 with them, that were aware of the dive flag requirement?

19 MR. LESSER: Objection. Calls for speculation as
20 to what they knew or didn't know.

21 A. I don't know.

22 Q. Well, Megan is the dive instructor, right?

23 A. Yes.

24 Q. And is Eric a dive instructor?

25 A. Yes, sir.

1 CERTIFICATE

2 STATE OF HAWAII)

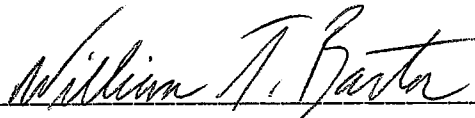
3) SS.

4 COUNTY OF HONOLULU)

5 I, WILLIAM T. BARTON, RPR, Certified Shorthand
6 Reporter, State of Hawaii, do hereby certify that on May 3,
7 2005 at 9:00 a.m. there appeared before me MATTHEW ISHAM,
8 the witness whose deposition is contained herein; and that
9 prior to being examined was duly sworn; that I am neither
10 counsel for any of the parties herein, nor interested in
11 any way in the outcome of this action;

12 That the deposition herein was by me taken down in
13 machine shorthand and thereafter reduced to print via
14 computer-aided transcription under my supervision; that the
15 foregoing represents a complete and accurate transcript of
16 the testimony of said witness to the best of my ability.

17 Dated this 12th day of May 2005 at Honolulu, Hawaii.

18
19 

20 WILLIAM T. BARTON, CSR No. 391

21 Notary Public, State of Hawaii

22 My Commission expires August 7, 2005

PADI DISCOVER SCUBA DIVING PARTICIPANT STATEMENT

Read the following paragraphs carefully. This Statement, which includes a Medical Questionnaire, the Discover Scuba Diving Safe Diving Practices and a Liability Release and Assumption of Risk Agreement, informs you of some potential risks involved in scuba diving and of the conduct required of you during the PADI Discover Scuba Diving Program. Your signature is required in order to participate in the program. If you are a minor, you must have the Participant Statement (which includes and acknowledges the Medical Questionnaire, the Discover Scuba Diving Safe Diving Practices and the Liability Release and Assumption of Risk Agreement) signed by a parent or guardian.

You will also need to learn from the instructor the most important safety rules regarding breathing and equalization while scuba diving. Improper use of scuba equipment can result in serious injury or death. You must be thoroughly instructed in its use under the direct supervision of a qualified instructor to use it safely.

Medical Questionnaire

Scuba diving is an exciting and demanding activity. To scuba dive safely, you must not be extremely overweight or out of condition. Diving can be strenuous under certain conditions. Your respiratory and circulatory systems must be in good health. All body air spaces must be normal and healthy. A person with heart trouble, a current cold or congestion, epilepsy, asthma, a severe medical problem, or who is under the influence of alcohol or drugs, should not dive. If taking medication, consult your doctor before participating in this program.

The purpose of this Medical Questionnaire is to find out if you should be examined by a physician before participating in recreational scuba diving. A positive response to a question does not necessarily disqualify you from diving. A positive response means that there is a preexisting condition that may affect your safety while diving and you must seek the advice of a physician.

Please answer the following questions on your past and present medical history with a YES or NO. If you are not sure, answer YES. If any of these items apply to you, we must request that you consult with a physician prior to participating in scuba diving. Your instructor will supply you with a PADI Medical Statement and Guidelines for Recreational Scuba Diver's Physical Examination to take to a physician.

- NO Do you currently have an ear infection?
- NO Do you have a history of ear disease, hearing loss or problems with balance?
- NO Do you have a history of ear or sinus surgery?
- NO Are you currently suffering from a cold, congestion, sinusitis or bronchitis?
- NO Do you have a history of respiratory problems, severe attacks of hayfever or allergies, or lung disease?
- NO Have you had a collapsed lung (pneumothorax) or history of chest surgery?
- NO Do you have active asthma or history of emphysema or tuberculosis?
- NO Are you currently taking medication that carries a warning about any impairment of your physical or mental abilities?

- NO Do you have behavioral health, mental or psychological problems or a nervous system disorder?
- NO Are you or could you be pregnant?
- NO Do you have a history of colostomy?
- NO Do you have a history of heart disease or heart attack, heart surgery or blood vessel surgery?
- NO Do you have a history of high blood pressure, angina, or take medication to control blood pressure?
- NO Are you over 45 and have a family history of heart attack or stroke?
- NO Do you have a history of bleeding or other blood disorders?
- NO Do you have a history of diabetes?
- NO Do you have a history of seizures, blackouts or fainting, convulsions or epilepsy or take medications to prevent them?
- NO Do you have a history of back, arm or leg problems following an injury, fracture or surgery?
- NO Do you have a history of fear of closed or open spaces or panic attacks (claustrophobia or agoraphobia)?

Instructor: You must register participants within 30 days by either completing the online form at the Pros Area of padi.com or mailing the Discover Scuba Diving Registration Card.

Discover Scuba Diving Registration Card

Entry code: DSD2

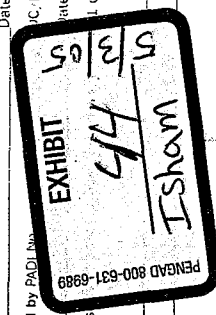
Participant Information - PLEASE PRINT

First Name Dennis Last Name DAYPOOL
 MI MI
 Participant Mailing Address 4330 E DECATUR
 City ANN ARBOR State/Province AZ
 Zip/Postal Code 48105 Country USA
 Home Phone 480-218-1155 Email 1953
 Date of Birth 12/19/53 Gender: ☐ M ☐ F
 Circle appropriate month: Jan Apr Jul Oct Feb May Aug Nov Mar Jun Sep Dec

Dive Center/Resort Location _____

Dive Verification

Pool/confined water conducted by PADI No. _____ DC/Resort No. _____
 Signature _____ Date _____
 Open water dive conducted by PADI No. _____ DC/Resort No. _____
 Signature _____ Date _____
 IF the participant completed all the course, please verify:
 Instructor Name (print) _____ Signature _____



Discover Scuba Diving Safe Diving Practices

These practices have been compiled for your review and acknowledgment and are intended to increase your comfort and safety in diving.

I understand that upon completing the Discover Scuba Diving Program, I will not be qualified to dive independently without a certified professional guiding me.

To equalize my ears and sinus air spaces, I will need to blow gently against pinched nostrils every few feet/one metre while descending.

If I have discomfort in my ears or sinuses during descent, I should stop my descent and alert my instructor.

Underwater, I should breathe slowly, deeply, continuously and never hold my breath.

I should respect underwater life and not touch, tease or harass an underwater organism since it may harm me and/or I may harm it.

I can seek further training from any PADI Dive Center, Resort and Instructor to become certified to dive without a professional guide.

Liability Release and Assumption of Risk Agreement

I (participant name), Dennis C. [Signature], hereby affirm that I am aware that skin and scuba diving have inherent risks which may result in serious injury or death.

I affirm I have read and understand the Safe Diving Practices and have had any questions answered to my satisfaction. I understand the importance and purposes of these established practices. I recognize they are for my own safety and well being, and that failure to adhere to them can place me in jeopardy when diving.

I understand that diving with compressed air involves certain inherent risks; decompression sickness, embolism or other hyperbaric injury can occur that requires treatment in a recompression chamber. I further understand that this program may be conducted at a site that is remote, either by time or distance or both, from such a recompression chamber. I still choose to proceed with this program in spite of the absence of a recompression chamber in proximity to the dive site.

The information I have provided about my medical history on the Medical Questionnaire is accurate to the best of my knowledge. I agree to accept responsibility for omissions regarding my failure to disclose any existing or past health conditions.

I understand and agree that neither the dive professionals conducting this program, _____, nor the facility through which this activity is conducted, _____, nor International PADI, Inc., nor any of their respective employees, officers, agents or assigns (hereinafter referred to as "Released Parties") may be held liable or responsible in any way for any injury, death or other damages to me, my family, estate, heirs or assigns that may occur as a result of my participation in this program or as a result of the negligence of any party, including the Released Parties, whether passive or active.

In consideration of being allowed to participate in this program, I hereby personally assume all risks for any harm, injury or damage, whether foreseen or unforeseen, that may befall me while participating in this program, including but not limited to the accidents, confined water and/or open water activities.

I further release and hold harmless the Discover Scuba Diving Program and the Released Parties from any claim or lawsuit by me, my family, estate, heirs or assigns, arising out of my participation in this program.

I further understand that skin diving and scuba diving are physically strenuous activities and that I will be exerting myself during this program and that if I am injured as a result of heart attack, panic, hyperventilation, etc. that I expressly assume the risk of said injuries and that I will not hold the Released Parties responsible for the same.

I further state that I am of lawful age and legally competent to sign this Assumption of Risk and Liability Release Agreement, or that I have acquired the written consent of my parent or guardian.

I understand that the terms herein are contractual and not a mere recital and that I have signed this Release of my own free act and with the knowledge that I hereby agree to waive my legal rights. I further agree that if any provision of this Agreement is found to be unenforceable or invalid, that provision shall be severed from this Agreement. The remainder of this Agreement will then be construed as though the unenforceable provision had never been contained herein.

I (participant name), Dennis C. [Signature] BY THIS INSTRUMENT DO EXEMPT AND RELEASE THE DIVE PROFESSIONALS CONDUCTING THIS ACTIVITY, THE FACILITY THROUGH WHICH THIS ACTIVITY IS CONDUCTED, AND INTERNATIONAL PADI, INC., AND ALL RELATED ENTITIES AND RELEASED PARTIES AS DEFINED ABOVE, FROM ALL LIABILITY OR RESPONSIBILITY WHATSOEVER FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH, HOWEVER CAUSED, INCLUDING BUT NOT LIMITED TO THE NEGLIGENCE OF THE RELEASED PARTIES, WHETHER PASSIVE OR ACTIVE.

I HAVE FULLY INFORMED MYSELF OF THE CONTENTS OF THIS LIABILITY RELEASE AND ASSUMPTION OF RISK AGREEMENT BY READING IT BEFORE SIGNING IT ON BEHALF OF MYSELF AND MY HEIRS.

[Signature] Participant Signature Date 01/20/06 Day/Month/Year
[Signature] Parent/Guardian Signature (where applicable) Date _____ Day/Month/Year

Emergency Contact Information

Name _____ Relationship _____ Phone (____) _____



Flying After Diving Recommendations

1) For single dives within the no decompression limits, a minimum pre-flight surface interval of 12 hours is suggested. 2) For repetitive dives and/or multi-day dives within the no decompression limits, a minimum pre-flight surface interval of 18 hours is suggested. 3) For dives requiring decompression stops, a minimum pre-flight surface interval greater than 18 hours is suggested.